STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 25, 2006
v	No. 257100 Wayne Circuit Court
GEORGE CANTAL FERGUSON, Defendant-Appellant.	LC No. 01-013378

Before: Cooper, P.J., and Jansen and Markey, JJ.

PER CURIAM.

After a resentencing hearing, defendant appeals as of right from a sentence of 12 to 20 years imposed on his conviction of second-degree murder, MCL 750.317, and a consecutive two-year term for possessing a firearm during the commission of a felony. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the trial court violated his right of allocution as provided by MCR 6.425(D)(2)(c) when it failed to address him separately and ask if he wished to address the court before it passed sentence. "[T]he trial court need not 'specifically' ask the defendant if he has anything to say on his own behalf before sentencing. The defendant must merely be given an opportunity to address the court if he chooses." *People v Petit*, 466 Mich 624, 628; 648 NW2d 193 (2002). In *Petit*, the Supreme Court found that the defendant "was given the opportunity to address the court when the court asked if there was 'anything further.'" *Id*. at 626, 636.

The instant case, however, is distinguishable from *Petit*, because the trial court simply failed to afford defendant any opportunity to allocute. At the brief resentencing hearing in July 2004, defense counsel and the prosecutor discussed the relevant guidelines, the trial court invited defense counsel to speak on defendant's behalf, and counsel did so. The trial court then turned to the prosecutor to ask, "Anything else you'd like . . . ." After the prosecutor's brief indication that he would "leave it within [the court's] discretion on whether you want to change the sentence," the trial court immediately launched into its recap of the evidence at trial, its resentencing of defendant, and its advice of defendant's appellate rights. At no time did the trial court inquire of defendant, specifically, or anyone in general whether they had anything further to offer. Meanwhile, as a convicted murderer, defendant remained silent, shackled and accompanied by armed officers, and common sense dictates that this arrangement certainly dampened his enthusiasm to interrupt the flow of the hearing and volunteer a statement on his

own behalf before the trial court recognized him in some fashion, either directly, through defense counsel or via a general "Anything else?" inquiry.

Because the trial court neglected to provide defendant a reasonable opportunity to allocute, we must reverse and remand for another resentencing at which the court affords defendant such an opportunity. *People v Petty*, 469 Mich 108, 119-123; 665 NW2d 443 (2003) (holding that even when the sentencing court lacked discretion regarding the penalty to impose, the court's failure to provide the juvenile defendant an opportunity to allocute required resentencing); see also *People v Wells*, 238 Mich App 383, 392; 605 NW2d 374 (1999).

Next, defendant contends that that the trial court erred in failing to obtain an updated presentence report. The record reflects that defense counsel expressed that he had no objection to the lack of an updated report, and thus waived the preparation of an updated report. *People v Hemphill*, 439 Mich 576, 582; 487 NW2d 152 (1992). Defense counsel's action extinguished any error arising from the absence of an updated written report. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

But immediately after defense counsel waived the preparation of a supplemental presentence information report, counsel presented evidence regarding defendant's good behavior in prison. The trial court took note of the following documentation:

> Let the record reflect the Court has the AA completion from September 13, 2002, the GED from April 8, 2004, the Anger Management Certificate of Achievement, May 27, 2004, completion of the ABE Writing Skills, January 9, 2003, ABE Skills to GED Skills, January 8, 2003, completion of ABE Math Skills, Department of Correction program and work evaluation with assignment paperwork, dated 6/1/04 with a very positive report.
>
> And from the AA, from September 13, 2002 regarding his involvement in the 12 step program, his assignment as a laundry man from November 3, 2003 to April 28, 2004, thank you. . . .

Defense counsel stressed that the trial court should consider defendant's recent, postconviction efforts toward rehabilitating himself. After reviewing the evidence presented at trial and the relevant guidelines, the trial court expressly declined to take into account defendant's behavior in prison, explaining, "He has done well since he's been incarcerated, but that's not an appropriate factor for the Court to consider, . . . it's where he was on the sentencing date of May 10, 2002."

The trial court plainly erred by refusing to consider the behavior of defendant in prison between his May 2002 initial sentence and the July 2004 resentencing hearing. It is a well-established principle that "sentencing must be individualized and tailored to the particular circumstances of the case and the offender *at the time of sentencing*." *People v Triplett*, 407

Mich 510, 515; 287 NW2d 165 (1980) (emphasis added) (holding that a reasonably updated presentence information report generally must be utilized at a felony resentencing).[1]

Reversed and remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Jane E. Markey

[1] To the extent that defendant did not specifically raise this argument on appeal, this Court nonetheless may consider for the first time on appeal issues of law. *Tingley v Kortz*, 262 Mich App 583, 588; 688 NW2d 291 (2004).